

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3
4 EDGARDO L. BIBILONI DEL VALLE,

5 Plaintiff,

6 v.

CIVIL NO. 07-1362 (RLA)

7 THE COMMONWEALTH OF PUERTO
8 RICO, et al.,

9 Defendants.

10
11 **ORDER IN THE MATTER OF**
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

12 The COMMONWEALTH OF PUERTO RICO ("COMMONWEALTH"), the P.R.
13 POLICE DEPARTMENT ("PR-PD"), ANGEL RIVERA and GALO SEGARRA - the
14 remaining defendants in these proceedings - have moved the court to
15 enter summary judgment in their favor and to dismiss the claims
16 asserted against them in this action. The court having reviewed the
17 arguments presented by the parties as well as the evidence submitted
18 in support thereof hereby disposes of the motion as follows:

19 **I. BACKGROUND**

20 This action was instituted by EDGARDO BIBILONI against the local
21 government and the two aforementioned individually-named defendants
22 in their personal capacity asserting federal causes of action
23 pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42
24 U.S.C. §§ 2000e, 2000e-3(a) (Title VII), as well as under 42 U.S.C.
25 § 1983 for breach of the due process and equal protection clauses of
26 the United States Constitution.

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Additionally, plaintiff claims violation of the Puerto Rico anti-discrimination statutes, Act No. 17 of April 22, 1988, P.R. Laws Ann. tit. 29, § 155 (2002) (Law 17) and Law 69 of July 6, 1985, as amended, P.R. Laws Ann. tit. 29, § 1321-1341 (2002) (Law 69) as well as the local tort provisions, arts. 1802 and 1803 of the Puerto Rico Civil Code, P.R. Laws Ann. tit. 31, §§ 5141 and 5142 (1990) under our supplemental jurisdiction.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) Fed. R. Civ. P., which sets forth the standard for ruling on summary judgment motions, in pertinent part provides that they shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir. 1999). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine issue exists if there is sufficient evidence supporting the claimed factual disputes to require a trial. Morris v. Gov't Dev. Bank of Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if

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3 it might affect the outcome of a lawsuit under the governing law.
4 Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir.
5 1995).

6 "In ruling on a motion for summary judgment, the court must view
7 'the facts in the light most favorable to the non-moving party,
8 drawing all reasonable inferences in that party's favor.'" Poulis-
9 Minott v. Smith, 388 F.3d 354, 361 (1st Cir. 2004) (citing Barbour v.
10 Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995)). "In
11 marshaling the facts for this purpose we must draw all reasonable
12 inferences in the light most favorable to the nonmovant. That does
13 not mean, however, that we ought to draw *unreasonable* inferences or
14 credit bald assertions, empty conclusions, rank conjecture, or
15 vitriolic invective." Caban Hernandez v. Philip Morris USA, Inc., 486
16 F.3d 1, 8 (1st Cir. 2007) (internal citation omitted, italics in
17 original).

18 Credibility issues fall outside the scope of summary judgment.
19 "'Credibility determinations, the weighing of the evidence, and the
20 drawing of legitimate inferences from the facts are jury functions,
21 not those of a judge.'" Reeves v. Sanderson Plumbing Prods., Inc.,
22 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing
23 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505,
24 91 L.Ed.2d 202 (1986)). See also, Dominguez-Cruz v. Suttle Caribe,
25 Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("court should not engage in
26 credibility assessments"); Simas v. First Citizens' Fed. Credit

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3 Union, 170 F.3d 37, 49 (1st Cir. 1999) ("credibility determinations
4 are for the factfinder at trial, not for the court at summary
5 judgment"); Perez-Trujillo v. Volvo Car Corp., 137 F.3d 50, 54 (1st
6 Cir. 1998) (credibility issues not proper on summary judgment);
7 Molina Quintero v. Caribe G.E. Power Breakers, Inc., 234 F.Supp.2d
8 108, 113 (D.P.R. 2002). "There is no room for credibility
9 determinations, no room for the measured weighing of conflicting
10 evidence such as the trial process entails, and no room for the judge
11 to superimpose his own ideas of probability and likelihood. In fact,
12 only if the record, viewed in this manner and without regard to
13 credibility determinations, reveals no genuine issue as to any
14 material fact may the court enter summary judgment." Cruz-Baez v.
15 Negron-Irizarry, 360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal
16 citations, brackets and quotation marks omitted).

17 In cases where the non-movant party bears the ultimate burden of
18 proof, he must present definite and competent evidence to rebut a
19 motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477
20 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; Navarro v. Pfizer
21 Corp., 261 F.3d 90, 94 (1st Cir. 2000); Grant's Dairy v. Comm'r of
22 Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely
23 upon "conclusory allegations, improbable inferences, and unsupported
24 speculation". Lopez-Carrasquillo v. Rubianes, 230 F.3d 409, 412 (1st
25 Cir. 2000); Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 581
26

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3 (1st Cir. 1994); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d
4 5, 8 (1st Cir. 1990).

5 Any testimony used in support of discriminatory motive in a
6 motion for summary judgment setting must be admissible in evidence,
7 i.e., based on personal knowledge and otherwise not contravening
8 evidentiary principles. Rule 56(e) specifically mandates that
9 affidavits submitted in conjunction with the summary judgment
10 mechanism must "be made on personal knowledge, shall set forth such
11 facts as would be admissible in evidence, and shall show
12 affirmatively that the affiant is competent to testify to the matters
13 stated therein." Hoffman v. Applicators Sales and Serv., Inc., 439
14 F.3d 9 16 (1st Cir. 2006); Nieves-Luciano v. Hernandez-Torres, 397
15 F.3d 1, 5 (1st Cir. 2005); Carmona v. Toledo, 215 F.3d 124, 131 (1st
16 Cir. 2000). See also, Quiñones v. Buick, 436 F.3d 284, 290 (1st Cir. 2006)
17 (affidavit inadmissible given plaintiff's failure to cite "supporting
18 evidence to which he could testify in court"). Additionally, the
19 document "must concern facts as opposed to conclusions, assumptions,
20 or surmise", Perez v. Volvo Car Corp., 247 F.3d 303, 316 (1st Cir.
21 2001), not conclusory allegations Lopez-Carrasquillo v. Rubianes, 230
22 F.3d at 414.

23 "To the extent that affidavits submitted in opposition to a
24 motion for summary judgment merely reiterate allegations made in the
25 complaint, without providing specific factual information made on the
26 basis of personal knowledge, they are insufficient. However, a

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3 party's own affidavit, containing relevant information of which he
4 has firsthand knowledge, may be self-serving, but it is nonetheless
5 competent to support or defeat summary judgment." Santiago v.
6 Centennial, 217 F.3d 46, 53 (1st Cir. 2000) (internal citations and
7 quotation marks omitted).

8 "A court is not obliged to accept as true or to deem as a
9 disputed material fact each and every unsupported, subjective,
10 conclusory, or imaginative statement made to the Court by a party."
11 Garcia v. Bristol-Myers Squibb Co., 535 F.3d 23, 31 n.5 (1st Cir.
12 2008) (internal citation, brackets and quotation marks omitted).

13 **III. FACTUAL BACKGROUND**

14 According to plaintiff, while employed as a janitor with the PR-
15 PD he was the object of inappropriate touching and sexual harassment
16 by a fellow janitor which situation was known to and instigated by
17 GALO SEGARRA, his supervisor, who failed to take any corrective
18 action. Plaintiff contends that he was subjected to retaliatory
19 harassment and eventual termination from employment for having
20 complained of the sexually charged environment.

21 The evidence in record shows that plaintiff worked as a "Técnico
22 de Mantenimiento" or janitor, in the General Services Division of the
23 PR-PD.

24 GALO SEGARRA, Director of the General Services Division, was
25 plaintiff's supervisor at all relevant times.
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3 **Domestic Violence Incident**4 Plaintiff was involved in a domestic violence incident with his
5 former wife, JOHANNA TORRES BURGOS, on February 2, 1999.6 In a sworn statement taken on February 16, 2000, by an
7 investigating officer ascribed to the PR-PD Division of Domestic
8 Violence and Sexual Harassment, JOHANNA TORRES BURGOS indicated that
9 she was again living with plaintiff within six months after the
10 event; his conduct had changed significantly; she had no interest in
11 pursuing the matter any further and refused to answer any questions
on the subject at that time.12 Plaintiff claims that a second Letter of Resolution of Charges
13 recommending his termination based on this incident was issued on
14 June 22, 2006, that is, more than seven years after the event.15 **Elevator Incident**16 According to a memorandum dated October 5, 2005, subscribed by
17 MIGUEL RIVERA CLAUDIO, Investigative Agent for the PR-PD Confidential
18 Investigations Division, on September 30, 2005, he received an
19 anonymous telephone call regarding an incident involving plaintiff
20 and MARGARITA FIGUEROA CARRASQUILLO.21 The memorandum indicates that at the end of June 2005, while
22 MRS. FIGUEROA CARRASQUILLO was about to take the elevator on the
23 eleventh floor of their office building, she was stopped by plaintiff
24 who asked her if she knew a certain "John Doe". When she inquired who
25 that person was, plaintiff asked her to check on the screen of his
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2 cellular telephone where a penis was shown. MRS. FIGUEROA
3 CARRASQUILLO reacted by telling plaintiff that this was disrespectful
4 and left.

5 The memorandum further notes that on September 30, 2005, MR.
6 RIVERA CLAUDIO interviewed MRS. FIGUEROA CARRASQUILLO who confirmed
7 the event but declined to press charges against plaintiff.

8 On October 18, 2005, FRANCISCO A. QUIÑONES RIVERA, ESQ., PR-PD
9 Auxiliary Superintendent of Public Integrity, referred the incident
10 involving MRS. FIGUEROA CARRASQUILLO to LT. I VILMA H. HERNANDEZ
11 BERMUDEZ, PR-PD Director of the Domestic Violence and Sexual
12 Harassment Bureau, for an administrative investigation.

13 On October 19, 2005, MRS. FIGUEROA CARRASQUILLO provided LT. I
14 HERNANDEZ BERMUDEZ with a sworn statement indicating that she did not
15 want to press charges against plaintiff because she did not consider
16 the incident sexual harassment but rather it showed a lack of
17 respect.

18 On December 2, 2005, LT. I HERNANDEZ BERMUDEZ issued a Grievance
19 Report wherein she concluded that "even though Mrs. Margarita
20 Figueroa Carrasquillo does not have any kind of interest in the
21 administrative grievance for alleged sexual-harassment, the Puerto
22 Rico Police takes action in the matter because the agency can not
23 tolerate this kind of behavior between the personnel as is stipulated
24 in the 'Regulation to [E]stablish the Public Policy and Procedure to
25
26

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3 Filed [sic] Grievances of Sexual Harassment in the Puerto Rico Police
4 No. 6508.''"¹

5 The Report recommended that plaintiff be issued a warning.

6 According to plaintiff, on June 14, 2006, a first Letter of
7 Resolution of Charges recommending his termination due to the
elevator incident was issued.

8 **Complaint of Sexual Harassment**

9 On October 25, 2005, plaintiff filed a complaint with the PR-PD
10 Sexual Harassment Bureau alleging that he was the victim of sexual
11 harassment at work by a fellow janitor, ANGEL RIVERA, which conduct
12 was instigated by his supervisor, GALO SEGARRA.

13 On March 2, 2006, LT. I VILMA HERNANDEZ BERMUDEZ rendered a
14 Report regarding plaintiff's sexual harassment complaint.

15 Based on the testimony of various witnesses, the Report
16 concluded that, rather than plaintiff being the victim of sexual
17 harassment on the part of ANGEL RIVERA, both plaintiff and co-worker
18 MIGUEL ANGEL ALICEA BRUNO consistently abused ANGEL RIVERA, who was
19 handicapped (deaf and dumb).

20 The Report recommended that the following sanctions be imposed:

21 Plaintiff: Termination

22 MIGUEL ANGEL ALICEA BRUNO: Termination

23 GALO SEGARRA: Ten days suspension

24

25

26 ¹ Docket No. 59-13 p. 2.

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3 On September 19, 2006, a third Resolution of Charges was issued
4 proposing plaintiff's removal based on the investigation results
5 regarding the aforementioned conduct.

6 Upon plaintiff's petition, an administrative hearing regarding
7 this matter was held on May 16, 2007. Via a letter dated November 20,
8 2007, plaintiff was notified of the PR-PR's decision to remove him
9 from employment.

10 Plaintiff was subsequently terminated from his job at the PR-PD.

11 **Retaliation**

12 On December 6, 2005, plaintiff filed a claim for retaliation
13 with the Puerto Rico Labor Department Anti-Discrimination Unit
14 alleging that shortly after he filed the aforementioned sexual
15 harassment complaint, the PR-PD filed a sexual harassment claim
16 against him based on an anonymous phone call even though the alleged
17 victim had no interest in pressing charges.

18 On November 13, 2006, plaintiff filed a retaliation claim with
19 the EEOC.

20 On January 29, 2007, the EEOC issued its notice of right to sue
letter.

21 **IV. TITLE VII**

22 **A. Sexual Harassment**

23 Defendants have moved us to dismiss plaintiff's sexual
24 harassment cause of action for failure to state a colorable claim as
25 well as on timeliness grounds.

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In his opposition, plaintiff clarifies that he is not pursuing a sexual harassment claim through these proceedings. He specifically noted that this action "is not a sexual harassment case; it is a retaliation case because he was fired and retaliated, because he [had] filed before a claim for sexual harassment at the EEOC."² Rather, "the **only cause of action** asserted in the complaint is based on his termination from employment allegedly due to **retaliation** for having filed a prior claim at the EEOC which it [sic] was for sexual harassment."³

Based on the foregoing, we need not address the arguments presented by defendants in their motion addressing alleged legal deficiencies and untimeliness⁴ pertaining to a sexual harassment cause of action.

B. Retaliation

"Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), states that it is unlawful for an employer to discriminate against an employee because 'he has opposed any practice made an unlawful employment practice..., or because he has made a charge, testified, assisted, or participated in any matter in an investigation,

² Plaintiff's Opposition (docket No. 62) ¶ 11 p. 4.

³ *Id.* (emphasis ours).

⁴ Defendants' arguments regarding timeliness in their summary judgment petition are addressed exclusively to the sexual harassment claims.

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3 proceeding, or hearing.''" DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir.
4 2008).

5 The interests sought to be protected by Title VII's anti-
6 discrimination mandate differ from those underlying its retaliation
7 clause. "The substantive provision seeks to prevent injury to
8 individuals based on who they are, i.e., their status. The anti-
9 retaliation provision seeks to prevent harm to individuals based on
10 what they do, i.e., their conduct." Burlington N. & Santa Fe Ry. Co.
11 v. White, 548 U.S. 53, 63, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).
12 "It therefore does not matter for retaliation purposes whether [the
13 employer] would have treated a male [employee] the same way he
14 treated [plaintiff]. The relevant question is whether [the employer]
15 was retaliating against [plaintiff] for filing a complaint, not
16 whether he was motivated by gender bias at the time." DeCaire, 530
17 F.3d at 19.

18 Hence, for retaliation purposes "[t]he relevant conduct is that
19 which occurred after [plaintiff] complained about his superior's
20 [discriminatory] related harassment." Quiles-Quiles v. Henderson, 439
21 F.3d 1, 8 (1st Cir. 2006) (italics in original).

22 "The evidence of retaliation can be direct or circumstantial."
23 DeCaire, 530 F.3d at 20. Unless direct evidence is available, Title
24 VII retaliation claims may be proven by using the burden-shifting
25 framework set forth in *McDonnell Douglas*. "In order to establish a
26 prima facie case of retaliation, a plaintiff must establish three

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3 elements. First, the plaintiff must show that he engaged in a
4 protected activity. Second, the plaintiff must demonstrate he
5 suffered a materially adverse action, which caused him harm, either
6 inside or outside of the workplace. The impact of this harm must be
7 sufficient to dissuade a reasonable worker from making or supporting
8 a charge of discrimination. Third, the plaintiff must show that the
9 adverse action taken against him was causally linked to his protected
10 activity." Mariani-Colon v. Dep't of Homeland Sec., 511 F.3d 216,
11 223 (1st Cir. 2007) (citations and internal quotation marks omitted);
12 Moron-Barradas v. Dep't of Educ. Of Commonwealth of P.R., 488 F.3d
13 472, 481 (1st Cir. 2007); Quiles-Quiles, 439 F.3d at 8.

14 "Under the *McDonnell Douglas* approach, an employee who carries
15 [his] burden of coming forward with evidence establishing a prima
16 facie case of retaliation creates a presumption of discrimination,
17 shifting the burden to the employer to articulate a legitimate, non-
18 discriminatory reason for the challenged actions... If the employer's
19 evidence creates a genuine issue of fact, the presumption of
20 discrimination drops from the case, and the plaintiff retains the
21 ultimate burden of showing that the employer's stated reason for the
22 challenged actions was in fact a pretext for retaliating." Billings
23 v. Town of Grafton, 515 F.3d 39, 55 (1st Cir. 2008) (citations,
24 internal quotation marks and brackets omitted).

25 "[A]n employee engages in protected activity, for purposes of a
26 Title VII retaliation claim, by opposing a practice made unlawful by

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3 Title VII, or by participating in any manner in an investigation or
4 proceeding under Title VII." Mariani-Colon, 511 F.3d at 224.

5 Plaintiff's prima facie burden "is not an onerous one." Calero-
6 Cerezo v. U.S. Dep't of Justice, 355 F.3d. 6, 26 (1st Cir. 2004). See
7 also, Dennis v. Osram Sylvania, Inc., 549 F.3d 851, 858 (1st Cir.
8 2008) (citing DeCaire, 530 F.3d at 19) (deemed a "'relatively light
9 burden'").

10 However, the effects of the retaliation must be materially
11 adverse to plaintiff. "[Title VII's] anti-retaliation provision
12 protects an individual not from all retaliation, but from retaliation
13 that produces an injury or harm." Burlington, 548 U.S. at 67. In
14 order to prevail on a retaliation claim "a plaintiff must show that
15 a reasonable employee would have found the challenged action
16 materially adverse, which in this context means it well might have
17 dissuaded a reasonable worker from making or supporting a charge of
18 discrimination." *Id.* at 68. It is not necessary that the conduct at
19 issue affect the employee's "ultimate employment decisions." *Id.* at
20 67.

21 The determination of whether a particular action is "materially
22 adverse" must be examined based on the facts present in each case and
23 "should be judged from the perspective of a reasonable person in the
24 plaintiff's position, considering all the circumstances." Burlington,
25 548 U.S. at 71 (citation and internal quotation marks omitted).
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2 In reaching its decision in Burlington, the Supreme Court
3 considered such factors as whether the duties of a position "were...
4 more arduous and dirtier" when compared to the other position which
5 "required more qualifications, which is an indication of prestige []
6 and... was objectively considered a better job". *Id.* (citation and
7 quotation marks omitted).

8 In Billings, the court distinguished between minor incidents
9 which take place in the usual course of a work setting and have no
10 import on an individual's decision to file a discrimination charge
11 and those which might deter an employee from complaining of such
12 conduct. Specifically, the court noted that "some of [the
13 supervisor's] behavior - upbraiding [plaintiff] for her question at
14 the Board of Selectmen meeting, criticizing her by written memoranda,
15 and allegedly becoming aloof toward her - amounts to the kind of
16 petty slights or minor annoyances that often take place at work and
17 that all employees experience and that, consequently, fall outside
18 the scope of the antidiscrimination laws... But we cannot say the
19 same for the other incidents, namely, investigating and reprimanding
20 [plaintiff] for opening the letter from [the supervisor's] attorney,
21 charging her with personal time for attending her deposition in this
22 case, and barring her from the Selectmen's Office. While these
23 measures might not have made a dramatic impact on [plaintiff's] job,
24 conduct need not relate to the terms or conditions of employment to
25 give rise to a retaliation claim. Indeed, we think that these
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2 actions, by their nature, could well dissuade a reasonable employee
3 from making or supporting a charge of discrimination. An employee who
4 knows that, by doing so, she risks a formal investigation and
5 reprimand - including a threat of further, more serious discipline -
6 for being insufficiently careful in light of her pending litigation
7 as well as the prospect of having to take personal time to respond to
8 a notice of deposition issued by her employer in that litigation,
9 might well choose not to proceed with the litigation in the first
10 place." 515 F.3d at 54 (citations, internal quotation marks and
11 brackets omitted).

12 "It is true that an employee's displeasure at a personnel action
13 cannot, standing alone, render it materially adverse... [but
14 plaintiff] came forward with enough objective evidence contrasting
15 her former and current jobs to allow the jury to find a materially
16 adverse employment action." *Id.* at 53.

17 Depending on the particular set of facts at hand, "temporal
18 proximity alone can suffice to meet the relatively light burden of
19 establishing a prima facie case of retaliation." DeCaire, 530 F.3d at
20 19 (citation and internal quotation marks omitted). See also,
21 Mariani-Colon, 511 F.3d at 224 ("[T]he 'temporal proximity' between
22 appellant's allegations of discrimination in June 2002 and his
23 termination in August 2002 is sufficient to meet the relatively light
24 burden of establishing a prima facie case of retaliation"); Quiles-
25 Quiles, 439 F.3d at 8 ("[I]n proper circumstances, the causation
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3 element may be established by evidence that there was a temporal
4 proximity between the behavior in question and the employee's
5 complaint"); Calero-Cerezo, 355 F.3d at 25 (three to four months
6 insufficient for causal connection).

7 Plaintiff carries the burden of presenting admissible evidence
8 of retaliatory intent in response to a summary judgment request. The
9 court need not consider unsupported suppositions. "While [plaintiff]
10 engages in much speculation and conjecture, a plaintiff cannot defeat
11 summary judgment by relying on conclusory allegations, or rank
12 speculation. To defeat summary judgment, a plaintiff must make a
13 colorable showing that an adverse action was taken for the purpose of
14 retaliating against him." Mariani-Colon, 511 F.3d at 224 (citations
15 and internal quotation marks omitted).

16 Additionally, even though "it is permissible for the trier of
17 fact to infer the ultimate fact of discrimination from the falsity of
18 the employer's discrimination, but doing so is not required, as there
19 will be instances where, although the plaintiff has established a
20 prima facie case and set forth sufficient evidence to reject the
21 defendant's explanation, no rational fact-finder could conclude that
22 the action was discriminatory." DeCaire, 530 F.3d at 19-20 (italics
23 in original).

24 "[T]here is no mechanical formula for finding pretext. One way
25 to show pretext is through such weaknesses, implausibilities,
26 inconsistencies, incoherencies, or contradictions in the employer's

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2 proffered legitimate reasons for its action that a reasonable
3 factfinder could rationally find them unworthy of credence and with
4 or without the additional evidence and inferences properly drawn
5 therefrom infer that the employer did not act for the asserted non-
6 discriminatory reasons." Billings, 515 F.3d at 55-56 (citations,
7 internal quotation marks and brackets omitted).

8 However, courts "should exercise caution in second guessing
9 [employer's] employment decisions. Courts should not act as super
10 personnel departments, substituting their judicial judgments for the
11 business judgments of employers." Dennis, 549 F.3d at 859 (citation
12 and internal quotation marks omitted). "In the absence of any
13 evidence that an employer's decision was pretextual or motivated by
14 discriminatory intent, a court has no right to supersede that
15 decision." Bennett v. Saint Gobain Corp., 507 F.3d 23, 32 (1st Cir.
16 2007).

17 Lastly, there are instances where issues of fact regarding the
18 veracity of the allegedly pretextual reasons demand that trial be
19 held to resolve them. See i.e., Billings, 515 F.3d at 56 (citations
20 and internal quotation marks omitted) ("But we think that, under the
21 circumstances of this case, it is the jury that must make this
22 decision, one way or another. As we have advised, where a plaintiff
23 in a discrimination case makes out a prima facie case and the issue
24 becomes whether the employer's stated nondiscriminatory reason is a
25 pretext for discrimination, courts must be particularly cautious
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3 about granting the employer's motion for summary judgment. Such
4 caution is appropriate here, given the factual disputes swirling
5 around the transfer decision.")

6 In order to adequately establish the necessary causation as part
7 of his *prima facie* burden, plaintiff must present evidence that the
8 person responsible for the decision at issue either was aware of the
9 protected conduct or "consulted with anyone possessing a motive to
10 retaliate against [plaintiff]... [to] support[] an inference of
11 complicity." Dennis, 549 F.3d at 858 (citation and internal quotation
marks omitted).

12 Even though "[t]emporal proximity can create an inference of
13 causation in the proper case... to draw such an inference, there must
14 be proof that the decisionmaker knew of the plaintiff's protected
15 conduct when he or she decided to take the adverse employment
16 action." Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 84 (1st
17 Cir. 2006). See also, Freadman v. Metropolitan Property and Cas. Ins.
18 Co., 484 F.3d 91, 106 (1st Cir. 2007) (no causal connection inasmuch
19 as accommodation request made after decision to remove plaintiff
20 made); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) ("[T]he
21 adverse action must have been taken for the purpose of retaliating.
22 And to defeat summary judgment, a plaintiff must point to some
23 evidence of retaliation by a pertinent decisionmaker.")

3 C. **Retaliatory Harassment**

4 In retaliation cases, “[t]he adverse employment action may be
5 satisfied by showing the creation of a hostile work environment or
6 the intensification of a pre-existing hostile environment.” Quiles-
7 Quiles, 439 F.3d at 9. See also, Noviello v. City of Boston, 398 F.3d
8 76, 89 (1st Cir. 2005) (“[T]he creation and perpetuation of a hostile
9 work environment can comprise a retaliatory adverse employment
10 action.”) “[A] hostile work environment, tolerated by the employer,
11 is cognizable as a retaliatory adverse employment action... This
12 means that workplace harassment, if sufficiently severe or pervasive,
13 may in and of itself constitute an adverse employment action sufficient
14 to satisfy the second prong of the prima facie case for...
15 retaliation cases.” *Id.* (under Title VII). “Harassment by coworkers
16 as a punishment for undertaking protected activity is a paradigmatic
17 example of adverse treatment spurred by retaliatory motives and, as
18 such, is likely to deter the complaining party (or others) from
19 engaging in protected activity.” *Id.* at 90.

20 “[R]etaliantory actions that are not materially adverse when
21 considered individually may collectively amount to a retaliatory
22 hostile work environment.” Billings, 515 F.3d at 54 n.13.

23 “In looking at a claim for hostile work environment, we assess
24 whether a plaintiff was subjected to severe or pervasive harassment
25 that materially altered the conditions of his employment. To sustain
26 a claim of hostile work environment, [plaintiff] must demonstrate

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3 that the harassment was sufficiently severe or pervasive so as to
4 alter the conditions of his employment and create an abusive work
5 environment and that the [discriminatory] objectionable conduct was
6 both objectively and subjectively offensive, such that a reasonable
7 person would find it hostile or abusive and [that plaintiff] in fact
8 did perceive it to be so." Thompson v. Coca-Cola Co., 522 F.3d 168,
9 179 (1st Cir. 2008) (internal citations and quotation marks and
brackets omitted).

10 "The environment must be sufficiently hostile or abusive in
11 light of all of the circumstances, including the frequency of the
12 discriminatory conduct; its severity; whether it is physically
13 threatening or humiliating, or a mere offensive utterance; and
14 whether it unreasonably interferes with an employee's work
15 performance." Prescott v. Higgins, 538 F.3d 32, 42 (1st Cir. 2008)
16 (citation and internal quotation marks omitted); Rios-Jimenez v.
17 Principi, 520 F.3d 31, 43 (1st Cir. 2008); Torres-Negron v. Merck &

18 Co., Inc.

19 , 488 F.3d 34, 39 (1st Cir. 2007).

20 "There is no mathematically precise test we can use to determine
21 when this burden has been met, instead, we evaluate the allegations
22 and all the circumstances, considering the frequency of the
23 discriminatory conduct; its severity; whether it was physically
24 threatening or humiliating, or a mere offensive utterance, and
25 whether it unreasonably interfered with an employee's work
26 performance." Carmona-Rivera v. Commonwealth of Puerto Rico, 464 F.3d

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3 14, 19 (1st Cir. 2006) (citation and internal quotation marks
4 omitted).

5 "In determining whether a reasonable person would find
6 particular conduct hostile or abusive, a court must mull the totality
7 of the circumstances, including factors such as the frequency of the
8 discriminatory conduct; its severity; whether it is physically
9 threatening or humiliating, or a mere offensive utterance; and
10 whether it unreasonably interferes with an employee's work
11 performance. The thrust of this inquiry is to distinguish between the
12 ordinary, if occasionally unpleasant, vicissitudes of the workplace
13 and actual harassment." Noviello, 398 F.3d at 92 (citations and
internal quotation marks omitted).

14 Plaintiff must provide "evidence of ridicule, insult, or
15 harassment such that a court could find behavior on the part of the
16 defendants that was objectively and subjectively offensive behavior
17 that a reasonable person would find hostile or abusive." Carmona-
18 Rivera, 464 F.3d at 19 (citation and internal quotation marks
19 omitted). See also, Noviello, 398 F.3d at 92 ("rudeness or ostracism,
20 standing alone, usually is not enough to support a hostile work
21 environment claim"); De la Vega v. San Juan Star, Inc., 377 F.3d 111,
22 118 (1st Cir. 2004) (general claims of "humiliating and discriminatory
23 treatment" not sufficient).

24 "[I]f protected activity leads only to commonplace indignities
25 typical of the workplace (such as tepid jokes, teasing, or
26

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2 aloofness), a reasonable person would not be deterred from such
3 activity. After all, an employee reasonably can expect to encounter
4 such tribulations even if she eschews any involvement in protected
5 activity. On the other hand, severe or pervasive harassment in
6 retaliation for engaging in protected activity threatens to deter due
7 enforcement of the rights conferred by statutes." Noviello, 398 F.3d
8 at 92.

9 Proving retaliatory intent is crucial. Hence, the purpose behind
10 the harassment must be to retaliate for the protected conduct, that
11 is, it must be motivated by plaintiff's exercise of his statutory
12 rights. Carmona-Rivera, 464 F.3d at 20; Quiles-Quiles, 439 F.3d at 9.

13 Causation may be established by the temporal proximity between
14 the harassment and the protected conduct. See, i.e., *id.* 439 F.3d at
15 9 (intensified harassment shortly after filing EEOC complaint).

16 Even though "[t]he existence of a hostile environment is
17 determined by the finder of fact... that does not prevent a court
18 from ruling that a particular set of facts cannot establish a hostile
19 environment as a matter of law in an appropriate case." Billings, 515
20 F.3d at 47 n.7.

21 D. **The Three Retaliatory Events**

22 Plaintiff cites the same events in support of both his
23 retaliation and retaliatory harassment claims. Thus, we shall examine
24 the charged conduct which took place after plaintiff filed his sexual
25

26

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3 harassment claim on October 25, 2005, to determine whether or not
4 they are actionable under either of these discrimination modes.

5 Plaintiff relies on the three Resolution of Charges Letters and
6 his termination as evidence of retaliation. The first Resolution of
7 Charges Letter, dated June 14, 2006, pertains to the 1999 domestic
8 violence incident whereas the second one, dated June 22, 2006, refers
9 to the elevator episode with MARGARITA FIGUEROA CARRASQUILLO. We are
10 not privy to either of these two letters. All we have before us
11 regarding this correspondence and surrounding events is plaintiff's
12 description thereof in his sworn statement none of which has been
13 challenged by defendants. We do not know the specifics regarding the
14 matters addressed in these documents nor the outcome of the personnel
15 actions proposed thereby.⁵

16 Lastly, plaintiff points to a third Resolution Charge Letter
17 which resulted from a PR-PD internal investigation and which
18 concluded that plaintiff sexually harassed his co-worker, ANGEL
19 RIVERA. This led to plaintiff's eventual termination.

20

21 ⁵ We initially note that the first two Resolution of Charges
22 Letters have not been made part of the record by either party and
23 that plaintiff's references thereto are far from clear. All we know
24 from plaintiff's declaration is that on June 14, 2006, a first Letter
25 of Resolution of Charges purportedly recommending his termination due
26 to the elevator incident involving MARGARITA FIGUEROA CARRASQUILLO
was issued. See Unsworn Statement under Penalty of Perjury (docket
No. 59-17) ¶¶ 8, 10 pp. 3-4. Plaintiff further avers that on June 22,
2006, a second Letter of Resolution of Charges was issued
recommending his termination based on a domestic violence incident
with his former wife. Id. ¶¶ 4-5, pp. 2, 3, 5.

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2
3 **1. Elevator Incident**

4 As to the elevator incident which gave rise to the first
5 Resolution of Charges Letter, there is no dispute that: the same did
6 take place in June 2005; MRS. FIGUEROA CARRASQUILLO was interviewed
7 on September 30, 2005; the investigation was initiated by a report
8 addressed to the PR-PRD Sexual Harassment Bureau on **October 5, 2005**,
9 and that by the time plaintiff submitted his discrimination claim an
10 investigation mandated by the PR-PD Policy regulations had already
11 taken its course. In other words, the matter regarding the
12 aforementioned occurrence which has not been controverted by
13 plaintiff was referred for investigation on **October 18, 2005**, prior
14 to October 25, 2005, the date when plaintiff submitted his sexual
15 harassment claim.

16 Effects of decisions taken prior to the protected conduct cannot
17 be deemed retaliatory because there is no possible causal
18 relationship between them. "The filing of a complaint cannot be the
19 basis for adverse employment action but it also cannot immunize an
20 employee from action already planned and not dependant on the
21 complaint." Sabinson v. Trustees of Dartmouth Coll., 542 F.3d 1, 5
(1st Cir. 2008).

22 We find that inasmuch as the investigation regarding the
23 elevator incident pre-dated plaintiff's sexual harassment complaint,
24 he cannot argue that it was carried out with retaliatory animus.
25 Plaintiff having failed at the causal relationship step of his
26

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3 initial prima facie burden, any attempt to claim retaliation based on
4 this particular incident is rejected.

5 Accordingly, the retaliatory claim based on the elevator
6 incident is hereby **DISMISSED**.

7 **2. Domestic Violence Incident**

8 In the case of the domestic violence incident, we have no idea
9 as to what, if anything, transpired from the time the event was
10 originally investigated and the time the second Resolution of Charges
11 Letter was purportedly issued which merited action on the part of the
12 PR-PD. Further, we are unaware of the outcome of the letter. The only
13 evidence on record reflects that plaintiff was involved in a domestic
14 violence incident with his former wife, JOHANNA TORRES BURGOS, on
15 **February 2, 1999**; that her sworn statement was taken by the PR-PD on
16 **February 16, 2000**, where she indicated that she had no interest in
17 pursuing the matter, and that an alleged second Letter of Resolution
18 of Charges recommending his termination based on this incident was
19 issued on **June 22, 2006**.

20 Apart from plaintiff's statement, there is no indication on
21 record as to what triggered PR-PD to issue the June 22, 2006 letter
22 regarding an incident which occurred seven years prior.

23 As previously noted, plaintiff's burden to prove a prima facie
24 retaliation claim is not onerous. For each claim there must be
25 evidence of plaintiff having engaged in protected conduct, some
26

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3 materially adverse action taken against plaintiff and a causal
4 relation existing between the two.

5 The challenged conduct need not be related to the employee's
6 working terms or conditions. Rather, as decreed by the Supreme Court,
7 we must ascertain whether a "reasonable employee would have found the
8 challenged action materially adverse, which in this context means it
9 well might have dissuaded a reasonable worker from making or
10 supporting a charge of discrimination." Burlington, 126 S.Ct. at 2415
11 (internal citations and quotation marks omitted). In other words, its
12 significance is gauged by its deterrent effect on either the filing
13 or endorsing discrimination complaints.

14 Further, whether the alleged actions are sufficiently severe
15 must be determined on a case-by-case basis and from the standpoint of
16 a reasonable person in like circumstances. Cotton v. Cracker Barrell
17 Old Country Store, Inc., 434 F.3d 1227, 1234 (11th Cir. 2006). Under
18 particular circumstances, "the existence of an adverse employment
19 action may be a question of fact for the jury when there is a dispute
20 concerning the manner in which the action taken affected the
21 plaintiff-employee." Bergeron v. Cabral, 560 F.3d 1, 6 (1st Cir.
22 2009).

23 "Whether an action is sufficient to constitute an adverse
24 employment action for purposes of a retaliation claim must be
25 determined on a case-by-case basis using both a subjective and an
26 objective standard. The employee's subjective view of the

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2 significance and adversity of the employer's action is not
3 controlling; the employment action must be materially adverse as
4 viewed by a reasonable person in the circumstances. Title VII is
5 neither a general civility code nor a statute making actionable the
6 ordinary tribulations of the working place." Cotton v. Cracker Barrel
7 Old Country Store, Inc., 434 F.3d at 1234 (internal citations,
8 quotation marks and brackets omitted).

9 At this stage of the proceedings, the issue before us is whether
10 a letter recommending termination from employment would dissuade a
11 reasonable person from making or supporting a discrimination charge.
12 An admonishment letter has been deemed to constitute an adverse
13 employment action for purposes of a retaliation claim. Almeyda v.
14 Municipality of Aguadilla, 447 F.3d 85, 97 (1st Cir. 2006).

15 In this particular case, we find that the risk of termination as
16 purportedly cautioned in the letter is sufficiently severe so as to
17 constitute a materially adverse action for purposes of Title VII. The
18 possibility of such a sanction could undoubtably be reasonably
19 considered by an employee as a deterrent from exercising his anti-
20 discrimination rights. In other words, being exposed to losing his
21 job would likely dissuade a reasonable person from complaining of
22 possible discriminatory conduct.

23 Based on the limited record before us and with defendants' total
24 failure to refute plaintiff's allegations on this particular point or
25 set forth any non-discriminatory reasons for the proposed
26

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3 termination, we must conclude that plaintiff has met his undemanding
4 prima facie burden regarding the domestic violence incident. No
5 explanation has been provided by defendants for issuing a letter in
6 2006 addressing events which took place in 1999, where the only
7 underlying support is the victim's statement - taken six years prior
8 - declining to provide information. The only apparent intervening
9 event was plaintiff's sexual harassment complaint which plaintiff
10 cites and we must accept absent evidence to the contrary.

11 Accordingly, the request to dismiss plaintiff's retaliation
12 claim under Title VII based on the second Letter of Resolution of
13 Charges due to the domestic violence incident is **DENIED**.

14 **3. Third Letter of Resolution of Charges and Termination**

15 Lastly, plaintiff contends that his termination pursuant to a
16 third Resolution of Charges Letter was also retaliatory. An
17 investigation report disposing of plaintiff's complaint concluded
18 that rather than being the victim of sexual harassment, plaintiff was
19 instead the aggressor in the sexual harassment of co-worker ANGEL
20 RIVERA.

21 We can safely conclude that plaintiff met his prima facie burden
22 on this particular cause of action. As previously noted, plaintiff
23 complained of discrimination which constitutes protected conduct and
24 both his employer's letter and eventual cessation of employment with
25 the PR-PD clearly constitute adverse actions. As to the retaliatory
26 motive, plaintiff refers to inculpatory statements allegedly made by

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2 his supervisors CRISTOBAL RIVERA and HECTOR NAVARRO. Specifically, in
3 his declaration plaintiff stated that "Hector Navarro told me the
4 comment that I will be fired due to the complaint of sexual
5 harassment that I filed against Galo Segarra and Angel Rivera".⁶
6 "Cristobal Rivera told me that I will be fired for the complaint that
7 I made to Galo Segarra and to Angel Rivera".⁷

8 Defendants countered alleging that these events resulted from an
9 exhaustive investigation and not from any retaliatory animus. This
10 position, however, has been put at issue by plaintiff. Even though
11 the investigation report used as grounds for plaintiff's termination
12 cites the testimony of various witnesses attesting to plaintiff's
13 harassing conduct towards ANGEL RIVERA, plaintiff has submitted
14 contradictory information tending to prove that it was he who was the
15 victim of ANGEL RIVERA's harassment. Plaintiff also makes reference
16 to a sworn statement of MIGUEL A. ALICEA BRUNO, his co-worker, citing
17 instances where ANGEL RIVERA engaged in unwanted touching and sexual
18 advances towards plaintiff and that GALO SEGARRA, their supervisor,
19 slighted plaintiff's complaints regarding RIVERA's behavior.⁸

20
21
22
23

24 ⁶ Unsworn Statement under Penalty of Perjury (docket No. 59-17)
¶ 28 pp. 10-11.

25 ⁷ *Id.* ¶ 29 p. 11.

26 ⁸ Sworn Statement of MIGUEL ALICEA BRUNO (docket No. 19-15).

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2 Plaintiff further indicated that ANGEL RIVERA's father was a PR-
 3 PD lieutenant⁹ and GALO SEGARRA's father a commander at the PR-PD¹⁰
 4 which also raise a possible specter of partiality in the
 5 investigation process.

6 "[W]here a plaintiff in a discrimination case makes out a prima
 7 facie case and the issue becomes whether the employer's stated
 8 nondiscriminatory reason is a pretext for discrimination, courts must
 9 be particularly cautious about granting the employer's motion for
 10 summary judgment." Billings, 515 F.3d at 56 (internal citations and
 11 quotation marks omitted).

12 Based on the foregoing, we find that plaintiff has met his
 13 burden of presenting evidence that defendants' purportedly non-
 14 discriminatory reasons for dismissal might be pretextual.

15 Accordingly, the request to dismiss the third Letter of
 16 Resolution of Charges and his termination as retaliatory under Title
 17 VII is **DENIED**.

18 **4. Harassment/Hostile Environment**

19 Plaintiff further argues that the aforementioned retaliatory
 20 events are also tantamount to a retaliatory hostile work environment.
 21 In Noviello the court specifically found that a hostile work
 22 environment may be deemed a retaliatory adverse action under Title
 23

24
 25 ⁹ Unsworn Statement under Penalty of Perjury (docket No. 59-17)
 ¶ 18 p. 7.

26 ¹⁰ *Id.* ¶ 19 p. 7.

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3 VII, 42 U.S.C. § 2000e(3)(a). "This means that workplace harassment,
4 if sufficiently severe or pervasive, may in and of itself constitute
5 an adverse employment action sufficient to satisfy the second prong
6 of the *prima facie* case for Title VII retaliation cases." Id. at 89.
7 "Harassment by coworkers as a punishment for undertaking protected
8 activity is a paradigmatic example of adverse treatment spurred by
9 retaliatory motives and, as such, is likely to deter the complaining
10 party (or others) from engaging in protected activity." Noviello, 398
F.3d at 90.

11 "An allegedly retaliatory act must rise to some level of
12 substantiality before it can be actionable. The hostile work
13 environment doctrine, as developed in the anti-discrimination
14 jurisprudence of Title VII, embodies that prerequisite. In order to
15 prove a hostile work environment, a plaintiff must show that [he] was
16 subjected to severe or pervasive harassment that materially altered
17 the conditions of [his] employment. The harassment must be
18 objectively and subjectively offensive, one that a reasonable person
19 would find hostile or abusive, and one that the victim in fact did
20 perceive to be so. In determining whether a reasonable person would
21 find particular conduct hostile or abusive, a court must mull the
22 totality of the circumstances, including factors such as the
23 frequency of the discriminatory conduct; its severity; whether it is
24 physically threatening or humiliating, or a mere offensive utterance;
25 and whether it unreasonably interferes with an employee's work
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3 performance. The thrust of this inquiry is to distinguish between the
4 ordinary, if occasionally, unpleasant, vicissitudes of the workplace
5 and actual harassment.

6 This framework is readily transferable to the retaliatory
7 harassment context. On the one hand, if protected activity leads only
8 to commonplace indignities typical of the workplace (such as tepid
9 jokes, teasing, or aloofness) a reasonable person would not be
10 deterred from such activity. After all, an employee reasonably can
11 expect to encounter such tribulations even if [he] eschews any
12 involvement in protected activity. On the other hand, severe or
13 pervasive harassment in retaliation for engaging in protected
14 activity threatens to deter due enforcement of rights conferred by
15 statutes such as Title VII... "Along this continuing, rudeness or
16 ostracism, standing alone, usually is not enough to support a hostile
17 work environment claim." Noviello, 398 F.3d at 92 (internal citations
18 and quotation marks omitted). "In reaching this conclusion, we take
19 into account the relative ubiquity of the retaliatory conduct, its
20 severity, its natural tendency to humiliate (and, on occasion,
21 physically threaten) a reasonable person, and its capacity to
interfere with the plaintiff's work performance." *Id.* at 93.

22 We find the hostile work environment scenarios confronted by the
23 courts in the aforementioned cases inapposite to the facts before us.
24 The outstanding retaliatory events are limited to distinct personnel
25 measures sufficiently severe in and of themselves for each one to be
26

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2 actionable under § 2000e-3(a). In examining the retaliatory conduct
3 charged by plaintiff herein we are not faced with the type of severe
4 and pervasive harassing environment at his workplace necessary to
5 impact on his employment conditions. Rather than classifying these
6 two Resolution of Charges Letters and plaintiff's termination as part
7 of a retaliatory harassment mode, we find that each one constitutes
8 a separate retaliation claim under Title VII.

9 Accordingly, the retaliatory harassment/hostile environment
10 claim asserted under Title VII is hereby **DISMISSED**.

11 **VII. § 1983 CLAIMS**

12 Plaintiff also charges violation of 42 U.S.C. § 1983 which
13 reads:

14 Every person who, under color of any statute,
15 ordinance, regulation, custom or usage, of any State or
16 Territory, subjects, or causes to be subjected, any citizen
17 of the United States or other person within the
18 jurisdiction thereof to the deprivation of any rights,
19 privileges, or immunities secured by the Constitution and
20 laws, shall be liable to the party injured in an action at
21 law, suit in equity, or other proceeding for redress.

22 Section 1983 does not create substantive rights but is rather a
23 procedural mechanism for enforcing constitutional or statutory
24 rights. Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d
25 114 (1994). The statute, i.e., § 1983 "is not itself a source of
26

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2 substantive rights, but a method for vindicating federal rights
3 elsewhere conferred... by the United States Constitution and federal
4 statutes.'" Rodriguez Garcia v. Municipality of Caguas, 354 F.3d 91,
5 99 (1st Cir. 2004) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3,
6 99 S.C. 2689, 61 L.Ed.2d 433 (1979)). Hence, it is plaintiffs' burden
7 to identify the particular underlying constitutional or statutory
8 right that is sought to be enforced via judicial proceedings.
9

10 In order to prevail in a § 1983 claim plaintiff must bring forth
11 evidence that defendant (1) acted "under color of state law" and (2)
12 deprived plaintiff of a federally protected right. Cepero-Rivera v.
13 Fagundo, 414 F.3d 124, 129 (1st Cir. 2005); Barreto-Rivera v. Medina-
14 Vargas, 168 F.3d 42, 45 (1st Cir. 1999); Rogan v. City of Boston, 267
15 F.3d 24 (1st Cir. 2001); Dimarco-Zapa v. Cabanillas, 238 F.3d 25, 33
16 (1st Cir. 2001); Collins v. Nuzzo, 244 F.3d 246 (1st Cir. 2001).

17 "As an additional corollary, only those individuals who
18 participated in the conduct that deprived the plaintiff of his rights
19 can be held liable." Cepero-Rivera, 414 F.3d at 130. See i.e.,
20 Barreto-Rivera, 168 F.3d at 48 (in the context of supervisors they
21 can be held liable solely "on the basis of [their] own acts or
22 omissions"); Diaz v. Martinez, 112 F.3d 1, 4 (1st Cir. 1997);
23 Maldonado-Denis, 23 F.3d at 581; Gutierrez-Rodriguez v. Cartagena,
24 882 F.2d 553, 562 (1st Cir. 1989). "Such liability can arise out of
25 participation in a custom that leads to a violation of constitutional
26 rights, or by acting with deliberate indifference to the

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2 constitutional rights of others." Diaz v. Martinez, 112 F.3d at 4
3 (citations omitted).

4 "In order for [plaintiff] to succeed on [his] claim of
5 [retaliation he] must demonstrate that defendants were involved in
6 the alleged deprivation of [his] rights, - in this case [the two
7 retaliatory events]. Imposition of liability requires that the
8 conduct complained of must have been *causally connected* to the
9 deprivation." Cepero-Rivera, 414 F.3d at 31 (italics in original)
10 (citations and internal quotation marks omitted).

11 Thus, as part of his *prima facie* burden plaintiff must set forth
12 evidence indicative of a causal connection or relationship between
13 the alleged misconduct and the defendants' acts or omissions. "In
14 order to have a valid claim under § 1983, plaintiff[] must show that
15 defendant's actions were the cause in fact of the alleged
16 constitutional deprivation." Sullivan v. City of Springfield, 561
17 F.2d 7, 14 (1st Cir. 2009).

18 **A. ANGEL RIVERA - Title VII**

19 Defendants move to dismiss the § 1983 claims asserted against
20 ANGEL RIVERA alleging that codefendant did not act under color of law
21 nor did he deprive plaintiff of a federally protected right.

22 Apart from conclusory statements regarding defendants in
23 general, the only allegation in the Amended Complaint addressed
24 specifically at codefendant ANGEL RIVERA pertains exclusively to sex
25 discrimination and reads as follows:
26

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3 18. Codefendants (sic), Mr. Angel Rivera, with his
4 homosexual conduct was the principal cause in the hostile
5 and offensive environment in the workplace and with his
6 action was the person that caused the retaliation against
7 [plaintiff], he never apologized for violating my dignity
8 and for creating an intimidating, hostile and offensive
9 environment in the workplace along with Mr. Segarra.

10 A careful reading of the pleading reveals that the claims
11 asserted against codefendant ANGEL RIVERA are based essentially on
12 his purportedly sexually harassing conduct which allegedly created a
13 hostile work environment. However, plaintiff has conceded that sexual
14 harassment is not at issue in this litigation. Further, as discussed
15 ante, only the retaliatory events pertaining to the domestic violence
16 incident as well as plaintiff's termination based on the PR-PD
17 internal investigation remain as viable Title VII discrimination
18 claims in this case. Yet, there is no evidence suggesting that
19 codefendant ANGEL RIVERA was in any way responsible for either of
them.

20 In carrying out the necessary § 1983 inquiry, attention must be
21 focused not on the alleged sexually harassing events - which
22 plaintiff consistently brings to the surface in his memorandum - but
23 rather on the outstanding retaliatory incidents, i.e., the charges
24 letter based on the domestic violence episode and plaintiff's
25 termination which resulted from the PR-PD internal investigation. In
26 this vein, the court has faced a colossal undertaking in trying to

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ascertain the specific legal claims in these proceedings. Not only
are the allegations in the complaint overly broad and interspersed
with conclusory statements but yet more difficult are plaintiff's
arguments in response to the summary judgment request. Despite
assertions that sexual harassment is not at issue, plaintiff's
opposition exclusively relies on the alleged harassing incidents in
his attempt to salvage his § 1983 cause of action against this
codefendant. Further, there is a dearth of documentary information
pertaining to the allegedly retaliatory memoranda and plaintiff's
termination.¹¹

12 Hence, plaintiff having failed to proffer evidence regarding
13 codefendant's personal involvement in either of the two subsisting
14 allegedly retaliatory events, he cannot premise his § 1983 cause of
15 action against ANGEL RIVERA on retaliation.

16 Based on the foregoing, plaintiff's § 1983 claim against
17 codefendant ANGEL RIVERA based on alleged violations of Title VII is
18 hereby **DISMISSED**.

B. Equal Protection

Liability under § 1983 based on equal protection principles mandates that plaintiff present sufficient evidence for a trier of

23 ¹¹ Only the September 19, 2006 Resolution of Charges Letter and
24 the November 20, 2007 termination letter were submitted as part of
the summary judgment process. We have not been privy to either the
25 alleged June 14, 2006 or June 22, 2006 Resolution of Charges
correspondence nor what consequences, if any, came about as a result
26 therefrom. Further, there is no indication in the record as to the
date when plaintiff was effectively terminated from employment.

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2 fact to conclude that "(1) [plaintiff] compared with others similarly
3 situated, was selectively treated; and (2) that such selective
4 treatment was based on impermissible considerations such as race,
5 religion, intent to inhibit or punish the exercise of constitutional
6 rights, or malicious or bad faith intent to injure a person."
7 Rubinovitz v. Rogato, 60 F.3d 906, 910 (1st Cir. 1995) (citations and
8 internal quotation marks omitted).

9 "A requirement for stating a valid disparate treatment claim
10 under the Fourteenth Amendment is that the plaintiff make a plausible
11 showing that he or she was treated differently from others similarly
12 situated. A similarly situated person is one that is roughly
13 equivalent to the plaintiff in all relevant respects." Estate of
14 Bennett v. Wainwright, 548 F.3d 155, 166 (1st Cir. 2008) (internal
15 citations and quotation marks omitted).

16 "In order to have a valid claim under § 1983, plaintiff[] must
17 show that defendant's actions were the cause in fact of the alleged
18 constitutional deprivation. It is not enough for plaintiff[] to show
19 [defendant] may have used an impermissible... classification; there
20 must be a causal link between this and the adverse employment action.
21 On an alleged Equal Protection Clause violation, the plaintiff must
22 show more than invidious intent. [He] must also demonstrate that the
23 causal connection between the defendant's action and the plaintiff's
24 injury is sufficiently direct." Sullivan v. City of Springfield, 561
25 F.3d 7, 14-15 (1st Cir. 2009) (internal citations, quotation marks and
26 brackets omitted).

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3 Plaintiff has failed to meet his burden regarding this
4 particular claim. In an overly broad manner, he alleges violations to
5 rights secured under the Equal Protection Clause of the Fourteenth
6 Amendment of the United States Constitution. However, apart from the
7 total lack of information as to the acts or omissions of either of
8 the two individual defendants necessary to establish the required
9 causal nexus, plaintiff has failed to specify how he was treated
10 differently from others similarly situated. There is nothing in
11 either the pleading or in plaintiff's response to the summary
12 judgment motion which indicates the type of classification which
13 purportedly resulted in an adverse action. In other words, plaintiff
14 has failed to compare his situation to that of other PR-PD employees
15 and explain how this classification motivated a difference in
treatment at work.

16 Accordingly, the equal protection claim asserted under § 1983 is
17 hereby **DISMISSED**.

18 C. **First Amendment - Retaliation**¹²

19 Retaliation for exercising rights protected under the First
20 Amendment may be vindicated through § 1983. See Broderick v. Evans,
21 570 F.3d 68 (1st Cir. 2009); Welch v. Ciampa, 542 F.3d 927 (1st Cir.
22 2008); Rosado-Quiñones v. Toledo, 528 F.3d 1, 5 (1st Cir. 2008).

23

24 ¹² Even though the complaint does not specifically mention the
25 First Amendment as a source of plaintiff's demand for relief, there
26 are sufficient retaliatory allegations in the pleading as to state
such a cause of action. Additionally, both parties address this
provision in their respective memoranda.

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3 As part of his burden to establish a free speech claim,
4 consonant with the standard set forth by the United States Supreme
5 Court in Mt. Healthy Sch. Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274,
6 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), "plaintiff must show that
7 he engaged in constitutionally protected conduct and that this
8 conduct was a substantial or motivating factor in the alleged adverse
9 employment action... If the [p]laintiff meets his prima facie burden
10 the defendant can prevail if it can establish it would have taken the
11 same action regardless of plaintiff's... protected conduct." Welch,
12 542 F.3d at 936; Fabiano v. Hopkins, 352 F.3d 447, 453 (1st Cir.
13 2003).

14 Initially a determination must be made to ensure that the
15 conduct at issue does fall within the ambit of the First Amendment.
16 This entails the following inquiry:

- 17 (1) whether the speech involves a matter of public concern;
18 (2) whether, when balanced against each other, the First
19 Amendment interests of the plaintiff and the public
20 outweigh the government's interest in functioning
21 efficiently; and (3) whether the protected speech was a
22 substantial or motivating factor in the adverse action
23 against the plaintiff.

24 Rosado-Quiñones v. Toledo, 528 F.3d 1, 5 (1st Cir. 2008).

25 Ordinarily, complaints regarding internal personnel matters
26 within a government agency are not deemed matters of public concern.
27 "[W]hen a public employee speaks not as a citizen upon matters of

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3 public concern, but instead as an employee upon matters only of
4 personal interest, absent the most unusual circumstances, a federal
5 court is not the appropriate forum in which to review the wisdom of
6 a personnel decision taken by a public agency allegedly in reaction
7 to the employee's behavior." Rosado-Quiñones, 528 F.3d at 5-6 (citing
8 Connick v. Myers, 461 U.S. 138, 147 , 103 S.Ct. 1684, 75 L.Ed.2d 798
9 (1983)). Indeed, "there is no absolute First Amendment right to file
lawsuits." Rosado-Quiñones, 528 F.3d at 7.

10 However, lawsuits to uphold civil rights or statutory policy
11 concerns under Title VII have been found to qualify for
12 Constitutional protection. *Id.* Thus, we find that based on the
13 circumstances present in this case, the complaint of sexual
14 harassment based on rights protected under Title VII sufficiently
15 meets the public interest requirement sufficient to meet plaintiff's
16 burden.

17 "Turning to the question of who can be held liable for [the
18 violation] we note that it is axiomatic that the liability of persons
19 sued in their individual capacities under section 1983 must be gauged
20 in terms of their own actions." Welch v. Ciampa, 542 F.3d at 936.

21 As previously discussed, there is no indication in the record as
22 to ANGEL RIVERA having played any role in either of the allegedly
23 retaliatory events charged by plaintiff. Hence, we conclude that
24 plaintiff has failed to establish a prima facie case against this
25 particular codefendant by failing to demonstrate that he was
26 "personally and directly involved in the alleged violation of his

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3 [First Amendment] rights." Cepero-Rivera, 414 F.3d at 130 (citation
4 omitted).

5 Thus, the § 1983 claim asserted against ANGEL RIVERA based on a
6 violation of plaintiff's First Amendment rights must be **DISMISSED**.

7 We must now ascertain whether there is evidence to connect GALO
8 SEGARRA with the alleged deprivation of First Amendment rights as a
9 result of the retaliatory events listed in the complaint. Plaintiff
10 charges GALO SEGARRA with sabotaging the PR-PD investigatory process
11 "by giving false declarations and meeting with his personnel so that
12 they would lie in their declarations."¹³ For purposes of the summary
13 judgment disposition currently before us, this connection - which has
14 not been challenged by defendants - is deemed sufficient to meet the
15 requisite causal relationship.

16 In this case defendants' sole argument addressing the legal
17 sufficiency of the First Amendment cause of action is that based on
18 the results of the sexual harassment investigation carried out by the
19 PR-PD, there was ample cause to terminate plaintiff for misconduct.
20 In other words, that the same action would have been taken against
21 plaintiff absent his sexual harassment complaint.

22 However, as previously discussed, the adequacy of this
23 investigation has been put at issue by plaintiff. There is sufficient
24 evidence available in this case for a reasonable trier of fact to
25 conclude that the administrative inquiry was infected with

26 ¹³ Amended Complaint (docket No. 13) ¶ 17.

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2 retaliatory animus. Given the extant controversy over such a crucial
3 piece of evidence, we find that the First Amendment claim against
4 this codefendant cannot be disposed of via summary judgment.

5 Based on the foregoing, the request to dismiss the § 1983 claim
6 based on First Amendment breach is **DENIED** as to GALO SEGARRA.

7 **D. Due Process**

8 Without any particularized information plaintiff generally
9 claims that his due process rights were violated.

10 The Due Process Clause provides that no state shall "deprive any
11 person of life, liberty or property without due process of law."
12 U.S. Const. amend. XIV, § 1.

13 In order to properly assert a procedural due process claim under
14 § 1983, plaintiff must show that: (1) he had a property interest and
15 (2) that defendants, acting under color of state law, deprived him of
16 that property interest without providing him with a constitutionally
17 adequate procedure. Ponte-Torres v. Univ. of P.R., 445 F.3d 50, 56
18 (1st Cir. 2006); Lacera v. Ferruzzi, 22 F.3d 344, 347 (1st Cir. 1994);
19 Mumford Pharmacy v. City of East Providence, 970 F.2d 996, 999 (1st
20 Cir. 1992); PAZ Properties v. Rodriguez, 928 F.2d 28, 30 (1st Cir.
21 1991). "Under the Due Process Clause of the Fourteenth Amendment,
22 persons who possess a property interest... cannot be deprived of that
23 interest without due process of law." Figueroa-Serrano v. Ramos-
24 Alverio, 221 F.3d 1, 6 (1st Cir. 2000). Hence, it is only in
25 situations where plaintiff has been able to establish a property
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3 right at stake that due process protection comes into play. See,
4 Redondo-Borges v. U.S. Dep't of Housing and Urban Dev., 421 F.3d 1,
5 7 (1st Cir. 2005) ("[f]or a claim to succeed, the plaintiffs must
6 identify a protected property or liberty interest.")

7 In order to ascertain the adequacy of the procedures available
8 to plaintiff "'it is necessary to ask what process the State
9 provided, and whether it was constitutionally adequate. This inquiry
10 would examine the procedural safeguards built into the statutory or
11 administrative procedure... effecting the deprivations, and any
12 remedies for erroneous deprivations provided by statute or tort
13 law.'" Lacera, 22 F.3d at 347 (citing Zinermon v. Burch, 494 U.S.
14 113, 126, 110 S.Ct. 975, 108 L.Ed. 100 (1990).

15 **1. Procedural Due Process**

16 "In its procedural aspect, due process ensures that government,
17 when dealing with private persons, will use fair procedures."
18 DePoutot v. Raffaelly, 424 F.3d 112, 118 (1st Cir. 2005). "Unlike
19 substantive due process, which is concerned primarily with why the
20 government deprives a person of life, liberty or property, procedural
21 due process is concerned with how the government deprives a person of
22 life, liberty or property. The fundamental requirement of due process
23 is the opportunity to be heard at a meaningful time and in a
24 meaningful manner." Paul H. Tobias, 2 Lit. Wrong. Discharge Claims
25 § 7.11. See i.e., Calderon-Garnier v. Rodriguez, 578 F.3d 33, 38 (1st
26

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3 Cir. 2009) (addressing pre and post termination due process
4 requirements).

5 In order to properly assert a procedural due process claim under
6 § 1983, “[p]laintiffs must allege they have a property interest as
7 defined by state law and, second, that the defendants, acting under
8 color of state law, deprived them of that property interest without
9 constitutionally adequate process.” Mercado-Alicea v. P.R. Tourism
10 Co., 396 F.3d 46, 53 (1st Cir. 2005) (citation, brackets and internal
11 quotation marks omitted); Cosme-Rosado v. Serrano-Rodriguez, 360 F.3d
12 42, 46 (1st Cir. 2004); Lacera v. Ferruzzi, 22 F.3d 344, 347 (1st Cir.
13 1994); Mumford Pharmacy v. City of East Providence, 970 F.2d 996, 999
14 (1st Cir. 1992); PAZ Properties v. Rodriguez, 928 F.2d 28, 30 (1st Cir.
15 1991).

16 “An essential principle of due process is that a deprivation of
17 life, liberty, or property be preceded by notice and opportunity for
18 hearing appropriate to the nature of the case.” Cleveland v. Bd. of
19 Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d
20 494 (1985) (citation and internal quotation marks omitted).
21 Meaningful due process includes “notice and an opportunity to be
22 heard.” Cosme-Rosado, 360 F.3d at 46 (citation omitted).

23 As part of his due process guarantee, a career employee “is
24 entitled to notice and a meaningful opportunity to respond prior to
25 termination. Before a career employee is discharged, he is entitled
26 to oral or written notice of the charges against him, an explanation

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3 of the employer's evidence, and an opportunity to present his side of
4 the story. Cepero-Rivera v. Fagundo, 414 F.3d 124, 134 (1st Cir. 2005)
5 (citation and internal quotation marks omitted). "A tenured public
6 employee is entitled to oral or written notice of the charges against
7 him, an explanation of the employers' evidence, and an opportunity to
8 present his side of the story." Loudermill, 470 U.S. at 546.

9 In Torres-Rosado v. Rotger-Sabat, 335 F.3d 1, 10-11 (1st Cir.
10 2003) the court found that plaintiff had been provided sufficient
11 notice of the evidence to be used at the hearing in that she was
12 given a letter spelling out in detail the allegations and findings
13 prompting her termination. The court ruled that this "explanation of
14 the employer's evidence which, combined with notice and an
15 opportunity to respond, satisfied the requirements of procedural due
16 process." (Citation and internal quotation marks omitted).

17 In the case at bar, plaintiff has failed to allege, much less
18 present evidence indicative of a lack of or inadequate process
19 regarding his retaliation claims. All we have before us are
20 allegations that three letters of charges were issued. Of these, we
21 do not know the procedural details or the outcome of the first two.
22 As to the last one, it was issued following an investigation where
23 plaintiff took part and there was a subsequent appeal.

24 Faced with this scenario, we find that no legal grounds exist to
25 support a procedural due process claim inasmuch as the record is
26 totally devoid of evidence showing that no adequate procedures were

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2 available to address plaintiff's grievances. Thus, we must conclude
3 that the procedural due process claim is not legally sufficient.
4

5 Additionally, there is no evidence suggesting that either of the
6 two individual defendants in this action actively participated or
7 were responsible for any deficiencies in the alleged due process
8 breach as mandated for a valid § 1983 claim.

9 Accordingly, the procedural due process claim asserted under
10 § 1983 is hereby **DISMISSED**.

11 **2. Substantive Due Process**

12 Even though the due process clause refers only to procedural
13 safeguards, it is settled that it also "contains a substantive
14 component that bars certain arbitrary, wrongful government actions
15 'regardless of the fairness of the procedures used to implement
16 them.'" Zinermon v. Burch, 494 U.S. at 125 (*citing Daniels v.*
17 Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986);
18 County of Sacramento v. Lewis, 523 U.S. 833, 840, 118 S.Ct. 1708, 140
19 L.Ed.2d 1043 (1998); Centro Medico del Turabo, Inc. v. Feliciano de
Melecio, 406 F.3d 1, 8 (1st Cir. 2005).

20 Procedural due process requires that a proceeding which results
21 in a deprivation of property be a fair one whereas substantive due
22 process guards against arbitrary and capricious government actions.
23 Lacera, 22 F.3d at 347.

24 "In its substantive aspect, due process safeguards individuals
25 against certain offensive government actions, notwithstanding that
26

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3 facially fair procedures were used to implement them." DePoutot, 424
4 F.3d at 118. "The doctrine of substantive due process does not
5 protect individuals from all governmental actions that infringe
6 liberty or injure property in violation of some law. Rather,
7 substantive due process prevents governmental power from being used
8 for purposes of oppression or abuse of government power that shocks
9 the conscience, or an action that is legally irrational in that it is
10 not sufficiently keyed to any legitimate state interests." Medeiros
11 v. Vincent, 431 F.3d 25, 33 (1st Cir. 2005) (citations and internal
12 marks omitted); SFW Arecibo, Ltd. v. Rodriguez, 415 F.3d 135, 141 (1st
13 Cir. 2005).

14 "The substantive due process guarantee functions to protect
15 individuals from particularly offensive actions on the part of
16 government officials, even when the government employs facially
17 neutral procedures in carrying out those actions." Pagan v. Calderon,
18 448 F.3d 16, 32 (1st Cir. 2006).

19 The courts have consistently held that substantive due process
20 claims are limited to extreme cases and "the threshold for
21 establishing the requisite 'abuse of government power' is a high one
22 indeed." Lacera, 22 F.3d at 350 (citing Nestor Colón-Medina &
23 Sucrs., Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992)). "A viable
24 substantive due process claim requires proof that the state action
25 was in and of itself egregiously unacceptable, outrageous, or
26 conscience-shocking". Lacera, 22 F.3d at 347 (internal quotation

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3 marks and citation omitted); Cruz-Erazo v. Rivera-Montanez, 212 F.3d
4 617, 622 (1st Cir. 2000). See also, Nestor Colón-Medina, 964 F.2d at
5 45 (substantive due process mechanism limited to "truly horrendous
6 situations").

7 "[T]he question of whether the challenged conduct shocks the
8 contemporary conscience is a threshold matter that must be resolved
9 before a constitutional right to be free from such conduct can be
10 recognized." DePoutot, 424 F.3d at 118.

11 "First, we must determine whether the official's conduct shocks
12 the conscience. Only if we answer that question affirmatively can we
13 examine what, if any, constitutional right may have been violated by
14 the conscience-shocking conduct and identify the level of protection
15 afforded to that right by the Due Process Clause." DePoutot, 424 F.3d
16 at 118. "To meet [his] burden on a substantive due process cause of
17 action, the [plaintiff] must present a well-pleaded claim that a
18 state actor deprived [him] of a recognized life, liberty, or property
19 interest, and that he did so through conscience-shocking behavior."
20 Estate of Bennett, 548 F.3d at 162. A "claim is cognizable as a
21 violation of substantive due process 'only when it is so extreme and
22 egregious as to shock the contemporary conscience.'" McConkie v.
23 Nichols, 446 F.3d 258, 260 (1st Cir. 2006) (citing DePoutot, 424 F.3d
24 at 118.)

25 In describing which action "shocks the conscience" for
26 substantive due process purposes, "[i]t has been said, for instance,

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that substantive due process protects individuals against state actions which are 'arbitrary and capricious,' or those that run counter to 'the concept of ordered liberty,' or those which, in context, appear 'shocking or violative of universal standards of decency.'" Cruz-Erazo, 212 F.3d at 622 (*citing Amsden v. Moran*, 904 F.2d 748, 753-54 (1st Cir. 1990)). "In order to shock the conscience, the conduct must be 'truly outrageous, uncivilized, and intolerable.'" McConkie, 446 F.3d at 260 (*citing Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999)).

Deprivations resulting from negligent acts or omissions on the part of state officers are not actionable under due process provisions. Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); Ramos-Piñero v. Puerto Rico, 453 F.3d 48, 54 (1st Cir. 2006). See i.e., Pagan, 448 F.3d at 32 (substantive due process clause should not "serve as a means of constitutionalizing tort law"); McConkie, 446 F.3d at 261 ("negligent conduct, simpliciter, is categorically insufficient to shock the conscience"). Nor is substantive due process protection triggered by merely unsound or erroneous government decisions. Its use is limited to those specific instances involving egregious abuse of governmental power which the courts find shocking. Collins v. City of Harker Heights, 502 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

Additionally, "violations of state law - even where arbitrary, capricious, or undertaken in bad faith - do not, without more, give

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2 rise to a denial of substantive due process". Coyne v. City of
3 Somerville, 972 F.2d 440, 444 (1st Cir. 1992). "The doctrine of
4 substantive due process does not protect individuals from all
5 governmental actions that infringe liberty or injure property in
6 violation of some law. Rather, substantive due process prevents
7 governmental power from being used for purposes of oppression, or
8 abuse of government power that shocks the conscience, or action that
9 is legally irrational in that it is not sufficiently keyed to any
10 legitimate state interests." PAZ Properties, 928 F.2d at 31-2
11 (citations and internal brackets and quotation marks omitted).

12 The very nature of this constitutional protection has caused
13 that substantive due process protection be used sparingly. "Courts
14 should guard against unduly expanding the concept of substantive due
15 process 'because guideposts for responsible decisionmaking in this
16 uncharted area are scarce and open ended'". S. County Sand & Gravel
17 Co., Inc. v. Town of South Kingstown, 160 F.3d 834, 835 (1st Cir.
18 1998) (*citing Collins v. City of Harker Heights*, 503 U.S. at 125).
19 Substantive due process, as a theory for constitutional redress, has
20 in the past fifty years been disfavored, in part because of its
21 virtually standardless reach." Nestor Colon-Medina, 964 F.2d at 45;
22 Lacera, 22 F.3d at 350.

23 Further, in situations where plaintiffs are protected from undue
24 interference from state actions by specific constitutional guarantees
25 "they must assert their claims under that particular constitutional
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3 rubric instead of invoking the more generalized notion of substantive
4 due process." S. County Sand & Gravel, 160 F.3d at 835. "Where a
5 particular Amendment provides an explicit textual source of
6 constitutional protection against a particular sort of government
7 behavior, that Amendment, not the more generalized notion of
8 substantive due process, must be the guide for analyzing these
9 claims." Lewis, 523 U.S. at 842 (*citing Albright v. Oliver*, 510 U.S.
10 266, 273, 114 S.Ct. 807, 127 L.Ed 2d 114 (1994)). See, i.e., Ramirez
11 v. Arlequin, 447 F.3d 19, 25 (1st Cir. 2006) ("Where the plaintiffs
12 have stated a viable First Amendment claim for the very same conduct,
13 we have declined to enter the unchartered thicket of substantive due
14 process to find an avenue for relief.") (citation and internal
15 quotation marks omitted).

16 We find that plaintiff's allegations do not fit under the
17 substantive due process rubric either. The circumstances depicted by
18 plaintiff as purportedly egregious pertain solely to the alleged
19 sexually harassing conduct of ANGEL RIVERA and to GALO SEGARRA's
20 alleged condonation and incitement thereof. There are no specific
21 facts raising to the extreme level of conduct required attributable
22 to either of the individual defendants regarding retaliatory
23 conduct.¹⁴ Accordingly, the claim for substantive due process
24 violation is hereby **DISMISSED**.

25

26 ¹⁴ Additionally, plaintiff already has available First Amendment protection as to GALO SEGARRA.

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3 **VIII. ELEVENTH AMENDMENT AND LOCAL CLAIMS**

4 Plaintiff concedes that the COMMONWEALTH OF PUERTO RICO and the
 5 PR-PD are shielded by the Eleventh Amendment from liability regarding
 6 the supplemental claims. Further, as previously noted, no such claims
 7 are asserted against the local government in these proceedings.¹⁵
 Thus, defendants' request in this regard is **MOOT**.

8 The local claims asserted under Law 17, Law 69 and torts,¹⁶
 9 however, subsist as to the individual defendants.¹⁷

10 **IX. CONCLUSION**

11 Based on the foregoing, defendants' Motion for Summary Judgment
 12 (docket No. 51)¹⁸ is hereby disposed of as follows:

- 13 - The Title VII retaliation claim based on the first Letter
 of Resolution of Charges due to the elevator incident is
 hereby **DISMISSED**.
- 16 - The Title VII retaliatory harassment/hostile environment
 claim is hereby **DISMISSED**.

20 ¹⁵ See Order Denying Motion to Dismiss filed by the Commonwealth
 21 of Puerto Rico (docket No. 39).

22 ¹⁶ Even though the parties mention Law No. 100 of June 30, 1959,
 23 P.R. Laws Ann. tit. 29, § 146 (2002) in their respective memoranda,
 we have not been able to find a reference to this statute in the
 Amended Complaint.

24 ¹⁷ No arguments were presented in the summary judgment request
 25 addressed at the viability of the supplemental claims asserted
 against the two individual defendants.

26 ¹⁸ See Opposition (docket No. 62).

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- 3 - Plaintiff's § 1983 claims asserted against codefendant
4 ANGEL RIVERA based on violations of Title VII are
5 **DISMISSED.**
6 - Plaintiff's § 1983 equal protection claims are **DISMISSED.**
7 - Plaintiff's § 1983 claims asserted against codefendant
8 ANGEL RIVERA based on First Amendment violations are
9 **DISMISSED.**
10 - Plaintiff's § 1983 due process claims are **DISMISSED.**

11 Judgment shall be entered accordingly.¹⁹

12 IT IS SO ORDERED.

13 San Juan, Puerto Rico, this 14th day of October, 2009.

14 _____
15 S/Raymond L. Acosta
RAYMOND L. ACOSTA
16 United States District Judge

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23 Based on today's ruling, only the following claims remain
24 outstanding in this action: (1) Title VII retaliation claim based on:
25 the second Letter of Resolution of Charges due to the domestic
violence incident, the third Letter of Resolution of Charges and
plaintiff's termination, (2) § 1983 First Amendment retaliation claim
against GALO SEGARRA and (3) local claims under Law 17, Law 69 and
26 torts against GALO SEGARRA and ANGEL RIVERA.